

JAMES STEADMAN
Claimant

PENNY'S CONCRETE, INC.
Respondent

CINCINNATI INSURANCE COMPANY
Insurance Carrier

The ALJ concluded the claimant was permanently and totally disabled as a result of his August 21, 2001 accidental injury. Respondent has appealed this Award and

contends that claimant's credibility with respect to this alleged accident as well as other earlier injuries is so compromised that the ALJ erred in concluding that claimant suffered a compensable injury. Respondent requests that the Board reverse the ALJ's finding on compensability and deny claimant benefits.

Claimant argues the Award should be affirmed in all respects, subject to the parties' stipulation regarding the medical expenses.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed that claimant was unrolling a tarp to dump a load of topsoil when the wind caught the tarp, causing claimant to fall to the ground, injuring his left shoulder and the left side of his neck.¹ Claimant immediately informed respondent and was referred for medical treatment. He continued to work but was eventually placed on light duty and referred to Dr. Stechschulte for evaluation. Dr. Stechschulte took claimant off work completely and referred him to Dr. Amundson. After a period of conservative treatment, including injections, claimant underwent a discogram and was diagnosed with 4 damaged discs.

Surgery was scheduled for January 17, 2002 with Dr. Amundson who intended to fuse 2 discs and repair 2 other discs. However, a few days before surgery the insurance company informed claimant that his claim was denied. Respondent made this determination based upon a report from a private investigator who observed claimant working as an announcer at a public rodeo in Ottawa, Kansas. During the course of this rodeo, claimant was observed using his arms and speaking to the crowd. At one point, when the workers were having some difficulty gathering up the bulls from the ring, he spoke to the crowd and indicated that he had injured himself while riding bulls. Shortly thereafter, respondent's insurance carrier informed claimant it would no longer be providing treatment.

Claimant went ahead with the surgery as scheduled. Thereafter, he sought additional treatment and after a preliminary hearing and an Order, respondent provided treatment to claimant's left shoulder and elbow.

Claimant has been examined by a variety of physicians and two have testified in this matter or provided opinions that indicate claimant is permanently and totally disabled as a result of the August 21, 2001 accident. Indeed, both parties agree claimant is presently

¹ P.H. Trans. at 6.

permanently and totally disabled. Nonetheless, respondent maintains that claimant's lack of credibility, particularly his own public statements made at a rodeo on December 7, 2001 as to the source of his injury and his failure to consistently disclose his extensive preexisting history, call into question whether his present condition is attributable to the accident he alleges occurred on August 21, 2001. Respondent contends the ALJ failed to read portions of the record and that this failure further justifies a reversal. Respondent's counsel states:

No mention is made in the [a]ward of the Administrative Law Judge's review of the medical records documenting the claimant's prior injuries. No mention was made of the false and inconsistent testimony provided by claimant at the discovery deposition and the Preliminary Hearing, concerning his denial of prior injuries. No explanation was provided by the Administrative Law Judge of the claimant's failure to repair these inconsistencies, once respondent obtained medical evidence documenting the prior injuries which claimant denied. Judge Howard's failure to review the entire record is evident, by his failure to recognize a stipulation entered by the parties concerning the payment of past medical expenses.²

The Board has considered the *entire record*, including the medical records, claimant's testimony, the two DVD versions of the rodeo, and the parties' stipulations and concludes the ALJ's Award should be affirmed as to the underlying compensability of claimant's claim, but modified as to the medical expenses, given the parties' stipulation.

Like the single Board Member who reviewed this matter upon appeal from the preliminary hearing, the Board concludes that "[t]he verbal exchanges [at the rodeo] clearly are intended to entertain the audience and in that context the comments claimant made cannot be considered an admission he was not injured during the course of his employment."³ That same Board Member went on to conclude "the audio clearly corroborates claimant's testimony rather than the report and testimony of the investigator hired by the respondent's insurance carrier."⁴ The Board affirms that finding. The statements made by claimant, in that context, were made in jest and could not rationally be taken as an admission in vein as suggested by respondent.

Respondent also contends that claimant's lack of veracity is borne out by his failure to disclose previous injuries. While it is true that claimant has had earlier injuries, both work-related and nonwork-related, it is equally true that his present ability to remember those events is compromised both by the passage of time and the fact that he takes significant medications for his pain.

² Respondent's Brief at 6-7 (filed Dec. 31, 2007)(footnote omitted).

³ Board Order, 2002 WL 1491803 (Kan. WCAB June 21, 2002) at 4.

⁴ *Id.*

Taken as a whole, the Board concludes that claimant is a poor historian and that fact is complicated by his medications. Respondent's contention that claimant is dishonest and has no memory problems because he's never been diagnosed with that condition is less than persuasive under these facts and circumstances. Claimant has been an active individual, participating in rodeos, tending cattle as well as working at manual labor jobs most of his adult life. As is often the case, he has sustained injuries and continued to soldier on, ignoring his complaints and only getting treatment when the symptoms were exceptionally debilitating. After sustaining his accidental injury on August 21, 2001, claimant received treatment and eventually had surgery to his neck, left shoulder and elbow. He has also had a pain stimulator implanted. Claimant has not returned to work and routinely takes pain medications, including morphine to deal with the effects of his injury. Under these facts and circumstances, the Board is not persuaded that claimant's inability to remember with absolute clarity the facts and circumstances surrounding his past accidents, some as far back as 15 years ago, is anything but a function of time and medications, rather than purposeful deception.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated November 6, 2007, is modified on the issue of medical expenses. Respondent is directed to pay the bills itemized in the parties' stipulation, subject to the fee schedule, along with the medical mileage itemized in that same exhibit. In all other respects the Award is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge